No. 2572

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

G. J. BUCHLER,

Appellant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING COMPANY, a Corporation,

Appellees.

REPLY TO BRIEF OF APPELLEE BLACK.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

O. C. MOORE,
Solicitor and Counsel for Appellant,
501 Peyton Building, Spokane, Washington.

GEORGE H. WALKER,
Solicitor and Counsel for Appellant,
705-6-7 Central Bldg., Seattle, Washington.

COLE PRINTING COMPANY

No._____

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

G. J. BUCHLER,

Appellant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING COMPANY, a Corporation,

Appellees.

REPLY TO BRIEF OF APPELLEE BLACK.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

O. C. MOORE,
Solicitor and Counsel for Appellant,
501 Peyton Building, Spokane, Washington.

GEORGE H. WALKER,
Solicitor and Counsel for Appellant,
705-6-7 Central Bldg., Seattle, Washington.

COLE PRINTING COMPANY

No.----------

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

G. J. BUCHLER,

Appellant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING COMPANY, a Corporation,

Appellees.

REPLY TO BRIEF OF APPELLEE BLACK.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

NO DEFEAT OF PARTIES.

The answer brief of Appellee Black not having reached the hands of the writer until the day before the oral argument we desire now to reply very briefly to two points brought forward therein.

It is contended in Black's brief, page 16, that the

Sunset Copper Mining Company was an indispensable party, and that the decree of dismissal must be sustained because process was not served on said company.

In our reply to Bell's brief (p. 7) we called attention to the return of the marshal (Tr. 21), to the effect that he was unable to find said corporation in the district, though by said return it is shown that personal service was made upon Black. On the same page of our reply to Bell's brief attention is called to the fact that the corporation was, in fact, dissolved before the institution of this litigation (Tr. 181).

Should the correctness of the rule contended for be admitted, yet the situation presented affords an exception to the general rule. In 10 Cyc. at page 997 the exception is stated as follows:

> "An exception to the foregoing rule, rendering it necessary to make the corporation a party defendant, may possibly be admitted where the corporation has suffered a de facto dissolution; but it would seem that its presence as a party defendant cannot be dispensed with unless it has suffered such a dissolution as disables it from suing or defending as a corporate body."

That a practically dissolved corporation is not an indispensable party to a suit by a minor stockholder for the recovery of the assets of the corporation is held in Ervin v. Oregon Ry. & Nav. Co., 20 Fed. 577, 581. The question here presented is discussed at considerable

length and though the corporation in that case was not actually dissolved, the assets having gotten into the hands of the majority stockholders the rule was held inapplicable.

It must also be borne in mind that the Sunset Copper Mining Company is named as a party defendant and the return of the marshal shows that a bona fide attempt was made to serve it with process. Process was personally served on Black, and since he was the only trustee residing within the state (Black's brief, p. 2) he was thereby estopped from claiming that the corporation was not served. The requirements of the law were thereby fully satisfied.

> "Filing a bill and taking out a subpoena and making a bona fide attempt to serve it have been deemed to be the commencement of a suit in equity as between the parties to it. There are cases, however, which hold that a suit in equity is commenced at the date of filing the bill."
>
> 1 Cyc. 750.

Attention is also called to Sec. 737 U. S. Revised Statutes, which is as follows:

> "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of, nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered

> therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

We also call attention to rules 22 and 47 of the old equity rules under which this suit was instituted, and likewise to rules 39 and 44 or the new equity rules relating to the question of parties. Rule 44 of the new equity rules is as follows:

> "If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and thereby specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties."

It seems to us that the contention of Black on this point was conclusively disposed of by the Supreme Court in the recent case of Waterman v. Canal-Louisiana Bank & T. Co., 215 U. S. 33, where in a suit by an heir against an executor and other heirs for the recovery of certain assets of the estate it was held that a non-resident heir on whom service could not be made was not an indispensable party in such a sense as to deprive the court of jurisdiction. The court said:

> "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affect-

ing the rights of such absent party. 1 Street, Fed Eq. Pr., 519.

If the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons. Payne v. Hook, 7 Wall 424, 19 L. Ed. 260.

Applying these principles to the case at bar, we are of opinion that the presence of Frederick T. Davis as a party to the suit is not essential to the jurisdiction of the Federal Court to proceed to determine the case as to the parties actually before it. In other words, that, while Davis is a necessary party, in the sense that he has an interest in the controversy, his interest is not that of an indispensable party, without whose presence a court of equity cannot do justice between the parties before it, and whose interest must be so affected by any decree to be rendered as to oust the jurisdiction of the court."

Discussing this question at considerable length, in the case of Silver King Coalition Mines Co. v. Silver King C. M. Co., 204 Fed. 166, 169, Judge Sanborn defines an indispensable party as follows:

"An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically

> and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or subject-matter which is separable from the interest of the other parties before the court, so that it will not necessarily be directly or injuriously affected by a decree which does complete justice between them, is a proper party to a suit. But he is not an indispensable party, and if his presence would oust the jurisdiction of the court the suit may proceed without him."

The general principles underlying and controlling the application of the rule, contended for, was discussed by this court in the recent case of Continental & C. T. & S. Bank v. Corey Bros. Const. Co., 208 Fed. 976, 981. The question was also thoroughly discussed by Judge Ross in the earlier case of MacRay v. Gabel, 117 Fed. 873, to which attention is now respectfully invited.

It should also be borne in mind that the trustees of the Sunset Copper Mining Company are, with the exception of Black, admittedly non-residents of the State of Washington (Black's brief, p. 2). The only rights, if any, vested in said trustees under Sec. 3715d, Rem. Bal. Code, cited by Black, is of an equitable nature for the benefit of the corporation and its "stockholders and creditors to be disposed of under appropriate court proceedings." It therefore appears that whatever right may be vested in said trustees is by

the express terms of the statute subject to the control and disposition of the court. Certainly neither these trustees nor the corporation which they represent can be injuriously affected by any decree which the court may make in the pending cause. If the decision of this court should be favorable to the complainant, then the corporation and its stockholders would be beneficially affected, while an adverse decision would only leave the property where it now is and no right or interest vested in said trustees could be in any wise affected by a decree in this cause since they are not parties thereto, and it seems to us that this court cannot go further, in any event, than to require said trustees to be brought in before a final disposition is made of the assets, should the decree appealed from be reversed.

A COMPLETE DEFENSE EXISTS TO THE NOTES AND MORTGAGES SUED UPON BY BELL.

In his brief filed herein, Black repeats the assertion theretofore made by him, as pointed out in our opening argument, that there was no defense to the Baldwin notes and mortgages upon which was based the suit by Bell wherein the assets of the company were sold to the appellees. This statement was also reiterated by Black in his oral argument before this court.

While the question whether there was or is a defense to said notes and mortgages obviously is not now

an issue and cannot be here tried out, the proposition may have a bearing and be worthy of remote consideration in determining the relative equities and the good faith of appellant in instituting and prosecuting the suit at bar.

We therefore call attention at this time to the fact that the complaint not only alleges that said notes and mortgages were fraudulently executed without consideration, but further alleges (Tr. 6) that several hundred thousand shares of stock were issued by the company to Mrs. Baldwin for which she did not pay in excess of two and one-half cents per share, though said stock was of a par value of $100 per share. In paragraph six of his answer (Tr. 26) this allegation of the complaint is admitted by Black:

Section 4, Article 22, of the Constitution of Washington provides:

> "Each stockholder in all incorporated companies, except corporations organized for banking or insurance purposes, shall be liable for the debts of the corporation to the amount of his unpaid stock, and no more, and one or more stockholders may be joined as parties defendant in suits to recover upon this liability."

It is not disputed that Bell took said mortgages subject to all outstanding defenses, and he now holds said obligations, as we understand, for the use and benefit of Mrs. Baldwin as her attorney and confiden-

tial agent and adviser. Clearly therefore and beyond dispute, it seems to us, the corporation was entitled, under the Constitution of the State of Washington, to receive the full par value from Mrs. Baldwin for the stock so issued to her, now held by Bell, and the indebtedness so created is now a defense to and should be offset against said mortgages in the hands of Bell.

As stated in the outset, this question cannot be finally determined by this court in the pending suit, nor was it foreclosed in the receivership suit, if we be correct in our contention that all proceeding had therein were void for want of jurisdiction, but on a reversal of the decree appealed from and the appointment of a receiver, the way would be open for the presentation of these demands by Bell in such manner as to permit of the proper determination of the questions suggested.

Respectfully submitted,

O. C. MOORE and
GEORGE H. WALKER,
Solicitors and Counsel for Appellant.